89-490

Supreme Court, U.S.
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No.

in the

SUPREME COURT

of the

UNITED STATES

October Term, 1989

JOHN M. JAY, Petitioner

vs.

BRUCE SUCHER, JOHN SANDS, DEE HAIL, GARY JACKSON, KEN PUFF, DONALD EVERS, AND THE CITY OF VANDALIA, Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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5 pp

Questions Presented

1. Whether the lower courts should have considered all relevant allegations in a light most favorable to the petitioner in deciding upon the respondent police officers' motion for summary judgment based upon the qualified immunity defense.

2. Whether a complaint, which alleges that the respondent city encouraged the officers to execute a search warrant in an unconstitutional manner, sets forth a violation of Petitioner's constitutional rights by the city and is sufficient to withstand a motion to dismiss Petitioner's Complaint.

LIST OF INTERESTED PARTIES

The only persons and entities having an interest in the outcome of this case are the Petitioner, Respondents, and the City of Vandalia.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable William H. Renhquist the Chief Justice and Associate Justices of the Supreme Court of the United States.

John M. Jay, the Petitioner herein, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 31, 1989.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix, Page 1. The Judgment of the United States District Court, Southern District of Ohio, Western Division at Dayton, is printed in Appendix, Page 2.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit (Appendix, Page 1) was entered on May 31, 1989. The jurisdiction of the court is invoked under Rule 17.1(a) and (b) of the Revised Rules for the Supreme Court of the United States.

STATUTES INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by

oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. Amend. IV.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. Amend. XIV, Section 1.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

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District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1983

STATEMENT OF THE CASE

Petitioner John Jay (hereinafter Mr. Jay) brought this cause of action pursuant to 42 U.S.C. Sections 1983 and 1988 against the City of Vandalia and individual police officers employed by the Vandalia Police

Department in the United States District Court for the Southern District of Ohio, Western Division at Dayton. Mr. Jay alleged that the City of Vandalia permitted and encouraged the officers to execute a search warrant at his residence in violation of rights guaranteed to him by the United States Constitution.

The facts as set forth in the Complaint are as follows: On January 17, 1988, at approximately 6:20 A.M., Mr. Jay was startled awake by a loud banging on his front door. Mr. Jay had been asleep in his bedroom in the rear of the residence, but he immediately rose from his bed and started down the hallway toward the front door. At this time, a police officer burst through the front door and leveled a shotgun at Mr. Jay. Aware of the harm which could be caused by a shotgun fired at close range, Mr. Jay immediately threw his arms in the air. The officer's

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sudden entry and the effect of having the shotgun pointed directly at him has and is causing Mr. Jay great emotional and psychological distress. Furthermore, Mr. Jay was clothed only in his underwear and was greatly embarrassed to be exposed in this manner before the officers, especially since a female officer was present during the execution of the search warrant. Although Mr. Jay was eventually allowed to put on a pair of trousers, this initial encounter still was and is a cause of embarrassment.

During the early moments after the officers entered the Jay residence, a document was handed to John Jay. This document was later found to be a search warrant. The police officers inquired as to the whereabouts of Sam Jay, Mr. Jay's son, and he directed the officers to Sam's room. After approximately one-half hour the officers left the Jay residence. None of the items which were listed in the search warrant

were found at the Jay residence, nor were any charges brought against Mr. Jay or his son as a result of the search.

The Defendants filed an Answer and provided limited discovery. The documents provided contained the officers' version of the execution of the search warrant. Admissions of the officers contained therein disclosed conduct which would seem improper to the reasonable police officer. First, the Affidavit for Search Warrant alleged that numerous items which appeared to be connected to the burglary of the adjacent residence, including a trail of VCR parts, a trail of coins, and a crowbar, were seen near the Jay residence. However, the officers did not remove any of these items when the search warrant was executed. Moreover, Mr. Jay examined the photographs taken by the police officers. A crow bar was shown in one of the photographs and many pennies were

shown on his patio in another. However, Mr. Jay subsequently found the crow bar in a different location than the photographs indicated, and he only found two pennies on his patio, although many were located ten to fifteen feet away. Second, the Affidavit for Search Warrant alleged that Sam Jay had performed similar burglaries in the past, however, this was incorrect. Sam Jay's criminal record was limited to some juvenile and traffic convictions. He had never been convicted or charged in a crime of the type under investigation. Third, Officer Poff conceded that he forced in the front door of the Jay residence after "a five second count," and that prior to forcing in the door he had received no response from within the Jay residence which could be interpreted as a denial of entry. The officers state that they watched the Jay residence for some time, but they do not allege that they observed any movements inside the house that

would suggest that the occupants were attempting to flee or destroy evidence. Moreover, Mr. Jay had in the past always cooperated fully with many of these same officers, and thus they had no reason to fear for their safety. However, the officers kicked in Mr. Jay's front door after only a five-second count without any suggestion from within the premises that entry would be denied or that exigent circumstances required a prompt entry. Fourth, Sergeant Sands gave to Sam Jay his Miranda warnings prior to questioning and Sam requested to speak with an attorney before any further questions. However, the Sergeant ignored Sam's request and continued to ask questions. Fifth, the Incident Report of Sergeant Sands seems to have been altered. In the penultimate sentence on page three of Sands' report it appears that a portion of that sentence was deleted. Said sentence reads "Officer Hail and Ptl. Poff

_____ a search warrant while this officer maintained a watch on the residence of 823 Bright Ave." Counsel is in a quandary as to the actions Officers Hail and Poff during the time in question, but counsel has been unable to pursue this matter since no further discovery was allowed. Finally, in the affidavit for Search Warrant the officers requested a nighttime search be allowed, yet they do not set out any facts which would support the need for a nighttime search of the Jay residence. Thus, the affidavit was completed incorrectly.

The Defendants filed a Motion for Summary Judgment and Limitation of Further Discovery. This motion alleged that the Defendant police officers and the Defendant city were entitled to summary judgment pursuant to Federal Rule of Civil Procedure 56(B). Defendants asserted that "based upon the pleadings and the authority announced by the United States Supreme Court in Anderson

v. Creighton and Monell v. New York City Department of Social Services, there is no genuine issue as to any material fact so that Defendants are entitled to judgment as a matter of law." (citations omitted).

The Defendant officers alleged in said motion that they were entitled to summary judgment pursuant to the qualified immunity defense. The Defendants set out the qualified immunity analysis as an objective one which "focuses upon whether a reasonable police officer, similarly situated, could have believed that his actions were lawful, in the light of clearly established law and the information the police officer possessed." The Defendant officers alleged that the validity of the search warrant was not at issue and that the actions of the officers executing the search warrant were reasonable in light of the circumstances. In support of the later contention the

Defendants placed before the lower court the case of State v. DeFiore, 64 Ohio App. 2d 115. This case allowed police officers to force entry when the place to be searched is not occupied. In the instant case the officers alleged that they had knocked upon Mr. Jay's door one and one-half hours earlier, but had received no response. Thus, the officers alleged that it was reasonable to conclude that the house was empty and that forcing in the door would not be a violation of clear law. The Defendants then turned their attention to the officers' actions inside the Jay residence, more specifically whether the officers violated Mr. Jay's constitutional rights by allowing a female officer to participate in the search and whether it was proper for the officers to enter the residence with their weapons drawn. The Defendants concluded that these actions were reasonable and that the officers were entitled to qualified immunity.

Finally, the Defendants addressed Mr. Jay's claim against the City of Vandalia. Defendants acknowledged that the Complaint need only allege that Mr. Jay's constitutional rights were violated by the officers pursuant to some city policy, formal or informal. Moreover, the Defendants acknowledged that the Complaint need not be specific. They nonetheless alleged that Mr. Jay's Complaint, which stated that the City of Vandalia permitted and encouraged the officers' actions, was insufficient.

Mr. Jay filed a memorandum opposing the Defendants' motion with an attached Affidavit of John Jay. This memorandum and affidavit once again set forth the basis of John Jay's cause of action. First, Mr. Jay countered the Defendants' allegation that the sufficiency of the Affidavit for Search Warrant had not been challenged. Mr. Jay was challenging the allegations contained in the

Affidavit for Search Warrant and the failure to complete this form properly, the manner in which the officers entered the Jay residence, and the officers' conduct once inside. Moreover, Mr. Jay was challenging the officers' determination that probable cause existed that Sam Jay was involved in the burglary of the adjacent residence. The officers had set out in the Affidavit for Search Warrant that items were seen between the Jay residence and the burglarized residence which appeared to be connected to the burglary. The area where these items were found was used by many people. Many individuals from an adjacent apartment building used this area as a pathway to a neighborhood park. It was likely that someone other than Sam Jay had left the items found by the officers in this area. Affidavit of John Jay. Thus, all the actions of the officers relating to the execution of the search warrant were at issue. Moreover,

Mr. Jay challenged the Defendants' contention that they had knocked on his residence one and one-half hours prior to forcing in the front door. This allegation was still at issue.

Moreover, Mr. Jay had not challenged the officers' decision to allow female officers to assist in the execution of search warrants, nor did he challenge the officers' decision to enter the residence with their weapons drawn. Mr. Jay was challenging the execution of the search warrant, and the fact that the officers pointed their weapons at him and that he was exposed in a state of undress was a direct result of the improper forcing in of his front door.

Plaintiff further contended that summary judgment on his claim against the city was also improper since he had not been allowed sufficient discovery to show with particularity the policy the officers were

following. However, the pleadings alleged a policy and were sufficient to withstand Defendants' motion.

A Decision and Entry Granting Defendants' Motion for Summary Judgment was filed on September 1, 1988. This decision addressed the Petitioner's claims against the individual police officers and against the City of Vandalia. The district court determined that Mr. Jay's claims against the individual officers were threefold: First, that the use of force on his door invaded a property interest; Second, that the pointing of a shotgun at his person placed him in unnecessary fear; and Third, his privacy interests were invaded by the presence of a female officer. The district court determined that the later two allegations were not valid. The court reasoned that an officer executing a search warrant could reasonably have his weapon drawn. Moreover, the only way to prevent a partially clad male

from being exposed in front of a female officer would be to preclude female officers from participating in searches where partially clad males might be found. The court further reasoned that this would effectively prevent searches where partially clad members of both sexes might be present. Thus, the later two allegations were not violations of Plaintiff's constitutional rights. The court was faced only with the determination of whether the initial forced entry of the officers was reasonable in light of clearly established law. The court cited numerous cases where forced entry was allowed after a similarly short time and concluded that it was not clearly established that a wait of five seconds was constitutionally insufficient, and thus, the officers were entitled to qualified immunity.

The court then addressed the Plaintiff's claim against the City of Vandalia.

Initially, the court noted that the city was not entitled to qualified immunity. The court concluded that the appropriate question is whether the officers violated Mr. Jay's constitutional rights pursuant to a policy or custom of the city. The court concluded that the Complaint was insufficient, since it did not state with particularity the person responsible or the policy itself. The Court further expounded that even if the Complaint was adequate, summary judgment would be proper since the court had determined that the officers had not violated Mr. Jay's constitutional rights.

Mr. Jay filed a timely Notice of Appeal and submitted a brief to the United States Court of Appeals for the Sixth Circuit. Mr. Jay set out the following four errors in the district court's decision: First, the district court had not sufficiently considered the particular facts facing the officers in performing the qualified immunity

analysis. When the circumstances of the instant case were viewed with the case law it would be clear to a reasonable officer that the manner in which the search warrant was executed was improper.

Second, the officers allegation that they had knocked on the Jay's door one and one-half hours before kicking in the door should not have been considered by the district court in making the summary judgment determination, since this was an unresolved issue. Mr. Jay alleged that the officers did not knock on his door as set forth in Sergeant Sands Affidavit. Moreover, even if the officers' allegation were to be considered, the officers would not be entitled to qualified immunity, since they did not make a reasonable effort to determine if the house was occupied.

Third, the district court incorrectly set out the issues in the case. Mr. Jay was

not alleging that it was improper to allow a female officer to participate in the execution of the search warrant or that the officers could not draw their weapons when executing a search warrant. The embarrassment and fear caused to Mr. Jay were the direct result of the unreasonable conduct of the officers in entering the residence. If the search warrant had been executed properly, i.e. if the officers would have waited a sufficient amount of time before forcing in the door, Mr. Jay would not have been placed in fear or been exposed in his underclothes before the police officers.

Fourth, the allegations against the City of Vandalia were sufficient to withstand Defendants' motion. Under Monell v. New York City, 436 U.S. 658, it need only be established that the officers were acting pursuant to a policy of the city. In the instant case Mr. Jay had set out in his Complaint that the city had a policy of

permitting and encouraging the officers to act as they did on the night in question. Moreover, it was irrelevant whether the officers were entitled to qualified immunity, since the city was not entitled to this defense.

Oral Argument was had before the United States Court of Appeals for the Sixth Circuit. Said court affirmed the district court's decision by Order filed May 31, 1989.

REASONS FOR GRANTING WRIT

I. THE QUALIFIED IMMUNITY ANALYSIS IS FACT-SENSITIVE, AND THUS THE CIRCUMSTANCES FACING THE OFFICERS WHEN THE SEARCH WARRANT WAS EXECUTED MUST BE CONSIDERED BEFORE IT CAN BE DETERMINED WHETHER A REASONABLE POLICE OFFICER WOULD KNOW CLEAR LAW WAS VIOLATED.

Courts are reluctant to impose civil liability upon public officials when said officials violate constitutional rights. A civil suit might be the "only realistic avenue for vindication of constitutional guarantees", however "damage suits against

government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Harlow v. Fitzgerald, 457 U.S. 800 (1981). This Court has determined that public officials are possessed with partial immunity or qualified immunity. A public official will only be liable if the actions taken would violate legal norms which would be known by a reasonable official. Id. See also Mitchell v. Forsyth, 472 U.S. 511 (1985).

This Court has determined that the qualified immunity analysis is fact-sensitive, and a court must examine more than case law in making this determination. See Anderson v. Creighton, 483 U.S. 635 (1988). In Anderson an FBI agent conducted a warrantless search of a home. The homeowner brought suit against the agent in state court

and the agent had the suit removed to federal district court. Prior to any discovery, the defendant agent moved for summary judgment based upon the qualified immunity defense. This motion was denied by the district court, since the court determined that it was clear law that warrantless searches are unlawful. Defendant appealed this decision to the United States Court of Appeals for the Eighth Circuit. He contended that the lower court should have considered the circumstances of the search along with the case law dealing with search warrants. The defendant contended that when the circumstances facing him were considered, his actions did not violate clear law as known by the reasonable agent. The court of appeals affirmed the lower court's decision.

On certiorari, this Court vacated and remanded the lower court's decision, it held that the qualified immunity analysis must be fact sensitive and requires consideration of

the circumstances facing the officer. This Court said that the lower courts needed to consider the exigencies facing the agent when he conducted his warrantless search. The qualified immunity analysis can not be made solely upon whether an issue has been resolved by clear law.

This Court has determined that the circumstances facing an officer must be considered. In Anderson the circumstances facing the agent made an otherwise unlawful act seem reasonable. A corollary is that when the circumstances do not make the officials actions reasonable the lack thereof must also be considered.

In the instant case the district court determined that there is no clear law concerning how long an officer must wait before executing a search warrant by forcing entry. In support of this contention the district court cited to several cases where

it was considered lawful for officers to force entry after a similarly short time. Decision and Entry Granting Defendants' Motion for Summary Judgment at 8-9 (citing United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986) and Hudson v. Edmonson, 848 F.2d 682 (6th Cir. 1988). However, the cases cited by the court all contained a common characteristic, these cases all involved exigent circumstances. The defendants in the instant cause of action have neither alleged, nor do the facts suggest, that exigent circumstances were present.

Exigent circumstances can be divided into three main categories; first, the evidence may be disposed of easily, second, the suspects may attempt to flee, and third, the officers may be in danger if they announce their presence and wait for a response. See State v. DeFiore, 64 Ohio App.2d 115, 117, 411 N.E.2d 837, 838 (footnote 1) (1979); United States v. Rumminen,



786 F.2d 381 (10th Cir. 1986); United States v. Jackson, 585 F.2d 653, 662 (4th Cir. 1979). None of these circumstances are present in the instant case.

The evidence being sought could not be disposed of easily. The items listed in the search warrant were as follows;

> (2) beige telephones (Sears and Ohio Bell), a live cat, a television (Mitchsubishi), a VCR (Magnavox), assorted ladies jewelry, and any other items found that were removed from the residence of 803 Bright Ave. or any other items found that were removed from any other residences that had been burglarized, and any parts thereof.

None of these items could be disposed of easily. Most situations involving easily disposed of evidence are drug-related.

The officers also had no reason to suspect that anyone was attempting to flee the residence. Sergeant Sands and Officer Poff acknowledged that the residence appeared quiet prior to the kicking in of the front

door. Mr. Jay had always cooperated with the Vandalia Police Department in the past.

Finally, there is no indication that the officers were entering a dangerous situation and a prompt entry was required. The discovery provided by the defendants tend to show the opposite. The suspect, Sam Jay, was a small person. He was listed in the search warrant as being five foot four inches, one hundred thirteen pounds. The crime which was being investigated was not a crime normally associated with overly dangerous persons, the burglary of an empty residence. Moreover, Sam Jay did not have this type of reputation. His previous encounters with the police were limited to juvenile and traffic offenses.

Thus, by no stretch of the imagination can it be alleged that the case at bar involved exigent circumstances. It is clear law that in the absence of exigent circumstances an officer may not forcibly enter a

residence executing a search warrant unless entry has been denied. Denial of entry can be inferred if no response is received, however, clear law dictates that an officer must wait longer than five seconds before forcing entry. See State v. DeFiore, 64 Ohio App. 2d 115, 411 N.E.2d 837 (1979).

The officers by forcing in the door after only a five second count violated clear federal constitutional norms. The proper execution of the search warrant is required in order to protect personal privacy in one's residence. The officers' unreasonable kicking in of Mr. Jay's door increased the likelihood that Mr. Jay would be injured and that they would encounter him under "circumstances [he] would never willing present [himself] to in public view." Note, Police Practices and the Threatened Destruction of Tangible Property, 84 Harvard Law Review 1465, 1493 (1971); See also Sabbath v. United States, 391 U.S. 585, 589 (1967); United States v.

Bustamante-Gomez, 488 F.2d 4, 12 (1973).

The officers have alleged that their actions did not violate clear law because they knocked on the Jay residence one and one-half hours before forcing entry. It appears that the district court had concluded that the officers' allegation that they had knocked on John Jay's door one and one-half hours earlier was not at issue. However, Mr. Jay disputed the officers' contention. Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(c); See also Green v. Carlson, 826 F.2d 647, 650 (7th Cir. 1987). Thus, a court can not grant summary judgment based on disputed facts. Since whether

or not the officers' had knocked on Mr. Jay's door is still at issue summary judgment is inappropriate.

Moreover, even if the officers' allegation were to be established, it should not be sufficient to grant the officers summary judgment based upon qualified immunity. The actions allegedly taken by the officers to determine if the residence was occupied were clearly insufficient. The officers claim to have knocked on Mr. Jay's front door one and one-half hours before they obtained the search warrant. This would have been approximately 4:40 A.M. In his affidavit Sergeant Sands does not allege that he rang the doorbell or attempted to phone the Jay residence. John Jay denies the officers made any attempt to determine if the residence was occupied. The reasonable police officer would have been more vigilant in attempting to determine if the house was occupied. Knocking one time at 4:40 A.M. is

clearly insufficient. The reasonable officer would not make this determination after such little effort was made at contacting the occupants of the residence.

Qualified immunity protects all "but the plainly incompetent or those who knowingly violate the law." Mallery v. Briggs, 475 U.S. 335, 341 (1986). In the instant case the officers who executed the search warrant were either incompetent or they knowingly violated the law. The course of conduct of the officers was unreasonable from the beginning to the end. They completed the Affidavit for Search Warrant incorrectly and with false facts (See Statement of Case at P. 9), they forced in Mr. Jay's front door after only a five second count, they gave Sam Jay his Miranda warnings and then ignored his request for an attorney, and they did not remove any of the items listed in the Affidavit for Search Warrant when the search war-

rant was executed.

Mr. Jay had never failed to cooperate fully with the Vandalia Police Department, and would have cooperated this time. The officers were not faced with a situation where evidence was potentially being destroyed, suspects were fleeing, or a proper announcement would endanger their lives.

No criminal charges were brought as a result of the search. There has been no criminal case wherein Mr. Jay's constitutional rights could be vindicated by suppression of evidence, and there is little doubt any evidence that would have been seized during this search would have been inadmissible. Mr. Jay's only vindication, and the officers' only punishment for their outrageous conduct, must come in a civil suit.

The officers have placed before the lower courts case law involving exigent circumstances and alleged that the law is unclear and they should be entitled to quali-

fied immunity. However, the defendants have acknowledged that the test of qualified immunity is "whether a reasonable police officer, similarly situated, could have believed that his actions were lawful, in the light of clearly established law and the information the police officer possessed." The information possessed by the officers did not suggest that exigent circumstances were present. Thus, the officers should have waited until entry was denied, and denial of entry clearly could not be inferred after only five seconds. This unreasonable entry heightened the danger of the search and unreasonably exposed Mr. Jay's private activities.

II. THE COMPLAINT SUFFICIENTLY SET OUT A CAUSE OF ACTION AGAINST THE DEFENDANT CITY OF VANDALIA

This Court has determined that a city is not entitled to qualified immunity. However, a city's liability is not boundless. A

cause of action will lie against the city if the official was acting pursuant to the city's "policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy." Monell v. City of New York, 436 U.S. 658, 694 (1978).

In the instant cause of action, John Jay has alleged in his Complaint that the City of Vandalia had a policy of permitting and allowing officers employed by the Vandalia Police Department to act in an unconstitutional manner. As a result of this policy the defendant officers conducted the unconstitutional search of Mr. Jay's home.

The defendants have not denied the above-mentioned claim, but allege that this allegation is insufficient under the law enunciated in Monell. Mr. Jay's Complaint set out that the officers were following city policy. This meets the standard set out by

this Court in Monell.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Alex V. DeMarco
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded by regular U.S. mail, postage prepaid to David Williamson, Attorney for Respondents, Bieser, Greer & Landis, 400 Gem Plaza, Third and Main Streets, Dayton, OH 45402, this 22nd day of September, 1989.

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Vandalia, OH 45377
(513) 898-3911

No.

in the

SUPREME COURT

of the

UNITED STATES

October Term, 1989

JOHN M. JAY, Petitioner

vs.

BRUCE SUCHER, JOHN SANDS, DEE HAIL, GARY JACKSON, KEN PUFF, DONALD EVERS, AND THE CITY OF VANDALIA, Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

No. 88-3909

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN M. JAY,

Plaintiff-Appellant,

-vs- ORDER

BRUCE SUCHER, ET AL.,

Defendants-Appellees

BEFORE: MERRIT and MARTIN, Circuit Judges;
and Lively, Senior Circuit Judge.

This cause having come on the be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the District Court, and it is therefore ORDERED that said judgment be, and it hereby is, AFFIRMED.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

ISSUED AS MANDATE: June 23, 1989
COSTS: None

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JOHN M. JAY,

Plaintiff, JUDGMENT IN A CIVIL CASE

v.

BRUCE SUCHER, et al.,

Defendant. Case No. C-3-88-139

/\ Jury Verdict. This action came before
\/ the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/\ Decision by Court. This action came
\/ to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED;

that Plaintiff John M. Jay's Amended Complaint as to the City of Vandalia is dismissed for failure to state a claim upon which relief can be granted;

that the Amended Complaint is dismissed with prejudice as to the individual Defendants; and

that Judgment is entered in favor of the Defendants and against the Plaintiff.

September 1, 1988 Kenneth J. Murphy
Clerk

_____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

JOHN M. JAY,

Plaintiff,

-vs- Civil Action No. C-3-88-139

BRUCE SUCHER, et al., Magistrate Merz

Defendants.

DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff brought this action pursuant to 42 U.S.C. Section 1983 to recover for alleged violations of his constitutional rights by Defendants. The individual Defendants are all police officers of the municipality Defendant, the City of Vandalia, Ohio.

The Amended Complaint alleges and Defendants admit that on or about January 17, 1988, the individual Defendants executed a search warrant at Plaintiff's residence at 823 Bright Avenue in Vandalia. Entry was admittedly effected by force and the Plain-

tiff alleges that the use of force to gain entry was unnecessary in that he was responding to the police knock on the door. Immediately upon entering, Defendant Jackson pointed a shot gun at Plaintiff for a brief time until he took a seat on the couch as directed. When the police initially entered, Plaintiff was in his underwear, a fact which embarrassed him in the presence of a female officer; however, when he requested a chance to put on a pair of pants, he was allowed to do so.

The search warrant executed at Plaintiff's premises was issued at 5:45 a.m. on January 17, 1988, by the Honorable Carl D. Kessler, Presiding Judge of the Montgomery County Common Pleas Court, upon the affidavit of Defendant Dee Hail (Attachments to Doc. #11). The probable cause supporting issuance of the warrant is further supported by the affidavit of Defendant John Sands (Attached to Doc. #14) which shows that he personally

observed a trail of coins and VCR parts from a burglarized residence at 803 Bright Avenue to the rear of Plaintiff's residence at 823 Bright. Defendant Sands also observed a crowbar at Plaintiff's residence and a crowbar had been apparently used to commit the burglary. Plaintiff's Amended Complaint does not allege that the search warrant was not supported by probable cause.

There is a disputed question of fact between the parties as to how long the individual Defendants waited after knocking and announcing that they were police officers with a search warrant before forcing an entry and an additional question as to whether the interval, however long, was reasonable.

The individual Defendants have moved the Court for summary judgment on grounds of qualified immunity. That defense is not available to the City of Vandalia. Owen v. City of Independence, 445 U.S. 622 (1980).

Vandalia claims that the Amended Complaint fails to state a claim against it upon which relief can be granted.

A government official performing discretionary functions is entitled to qualified immunity as long as his conduct does not violate clearly established rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The key question is not what the official knew to be the law, but "objective legal reasonableness." Anderson v. Creighton, 483 U.S. ___, 97 L. Ed. 2d 523 (1987). The law in question is federal constitutional, statutory, and case law. Dominique v. Telb, 831 F. 2d 673, 677 (6th Cir. 1987). Resolution of the qualified immunity defense is purely a question of law for the Court. Id.

The right allegedly violated must be particularized in description. Anderson, supra; Poe v. Haydon, ____ F. 2d ___, No.

87-5377 (6th Cir. July 28, 1988). Thus it is not enough to be able to note that the Fourth Amendment applies to execution of search warrants. Rather, the questions is whether a reasonable official in defendant's position could have believed his actual conduct to be lawful, considering the state of the law when he acted. Anderson, supra.

Against that legal background, th rights or interests which Plaintiff claims were invaded seem to be three. First, and most important, he says his property interests were unreasonably invaded by the use of force on the door when he was attempting to answer it. Secondly, he claims he was put in unnecessary fear by having a shotgun leveled at him. Thirdly, he claims his privacy interests were invaded by being confronted in his underwear by a female police officer.

The latter two claims are relatively easily dealt with. Plaintiff cites no law to the effect that an officer executing a search

warrant may not make a display of weapons until the situation is stable. The testimony is uncontroverted that the weapon was only pointed at Mr. Jay long enough for the executing officers to be suer that the situation was stable and that he was not acting to obstruct the search.

As to the privacy claim, Plaintiff also points to no law to the effect that permitting a female police officer to execute a search warrant where there is a chance that some searched male may be found in his underwear (or even less clad) violates the Constitution. The officers did not know in advance how Mr. Jay would be clad or even if anyone was there. As soon as he asked to get dressed, he was permitted to do so. In order to prevent any chance of such a confrontation, police departments would have to preclude female officers from participating in "raids" where partially clad males might be

present or male officers from doing so where partially clad females might be present. Such a rule would run squarely afoul of the officers' rights under Title VII of the 1964 Civil Rights Act and make any search warrant execution impossible where the presence of persons of both sexes, scantily clad, might reasonably be expected.

The forced entry question is more serious. Plaintiff claims that the manner of entry violated Ohio's knock and announce statute, Ohio Revised Code Section 2935.12. Technically, the violation of an Ohio statute does not give rise to a claim of constitutional violation. However, execution of warrants is covered by the reasonableness standard of the Fourth Amendment and that standard is in part codified by the various knock and announce statutes. The rule requiring an officer to knock and announce his purpose in fact far predates the Constitution. Semayne's Case, 5 Coke 91, 77 Eng.

Rep. 194 (K.B. 1603).

While the rule is of ancient lineage, some of its contours are clearer than others. Usually, for example, a failure to announce one's identity as a police officer will invalidate the search and result in suppression of the evidence; however, even failure to announce may be sanctioned on a case-by-case basis. Ker v. California, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963).

The parties' accounts of what actually happened differ. Plaintiff says that he was asleep and did not hear a knock or any voices before the police broke in. He also conducted a later experiment, rising from his bed when fully awake and going to the front door, which took him twelve seconds.

The police indicate they had gone to the house an hour and a half before the warrant was executed and loudly knocked, obtaining no response (Affidavit of Defendant Sands).

Plaintiff does not indicate whether he or anyone else was at home at that time, although it would have been around 4:00 or 4:30 a.m. When the warrant was available, the police indicate they knocked again, announced their purpose, and again received no response. As indicated by the Affidavit of Gary Jackson, the entry was tape recorded. That tape was made available to the Court and it is clear from listening to it that the police did identify themselves, announce their purpose, and wait some period of time before forcing entry. On this state of the evidence, of course, it is perfectly possible Mr. Jay was at home both times and simply did not hear the knock. The exact delay before forcing entry is also in dispute: Defendants calculate the interval on the tape recording at 10 seconds, but Plaintiff points out one of the police reports produced in discovery speaks about a "five second count" before use of force.

Whatever the precise interval of time (and the Court, having not been present with a stopwatch will never know precisely what it was), the question is whether the individual defendants violated a clearly established right of Plaintiff or put another way, could they have reasonably concluded that their actions were lawful? While the law is clear that an officer must knock and announce and allow some interval for response, it is not clear how much of an interval must be permitted. Compare, State v. DeFiore, 64 Ohio App. 115, 411 N.E. 2d 837 (1979) with United States V. Ruminer, 786 F. 2d 381 (10th Cir. 1986).

As Plaintiff notes, most of the cases dealing with intervals have been criminal cases where the matter is adjudicated on a motion to suppress. In such cases, the sanction for estimating wrongly the interval that must be allowed is a loss of the convic-

tion. In this case, we are instead concerned with personal liability of the officers for a mistake. It cannot be said with any certainty that the law is an executing officer must wait ten or twenty or thirty seconds before using force to enter. It is therefore not "clearly established" that waiting only five or ten seconds violates the rights of the person being searched. That being the case, the individual officers are entitled to qualified immunity for their actions in executing this warrant. Hudson v. Edmonson, 848 F. 2d 682 (6th Cir. 1988).

As noted before, the City of Vandalia is not entitled to the qualified immunity defense. Owen v. City of Independence, 445 U.S. 622 (1980). However, the Court finds the Plaintiff's Amended Complaint fails to state a claim for relief against Vandalia upon which relief can be granted.

The sole allegation made against the city in the Amended Complaint is as follows:

> Plaintiff alleges that the City of Vandalia is liable for the acts of the police officer because the City has permitted and encouraged the police officers to conduct themselves in the manner in which they acted.

It is clear first of all that Vandalia cannot be liable under Section 1983 merely because it employs the individual Defendants. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). Rather, in order to hold the City liable, it must be shown that the individual Defendants acted pursuant to some city policy. Id. No such policy is even alleged in the Amended Complaint. Only by the broadest of constructions can the language "has permitted and encouraged" be read to mean that this has happened on more than one occasion and even that would not be sufficient to allege a "policy." Plaintiff has

not identified, even by allegation, the contents of any such practice or policy, the persons responsible for making it, and so forth. Plaintiff's allegations against the City itself are completely conclusory and insufficient.

Apart from the level of generality in Plaintiff's allegations, the Court also notes that, even if the City had permitted and encouraged by written ordinance the conduct which the officers engaged in, most of it has been found to be clearly constitutional and the interval between announcing and forcible entry has been found not to violate clearly established rights.

Plaintiff's Amended Complaint as to the City of Vandalia is dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted and as to the individual Defendants, with prejudice pursuant to Fed. R. Civ. P. 56 in that there is genuine issue of fact and the indi-

vidual Defendants are entitled to judgment as a matter of law on their qualified immunity defense.

September 1, 1988.

Michael R. Merz
UNITED STATES MAGISTRATE

Supreme Court, U.S.
FILED
OCT 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-490

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN M. JAY,

Petitioner,

vs.

BRUCE SUCHER, JOHN SANDS, DEE HAIL, GARY JACKSON, KEN POFF, DONALD EVERS, and the CITY OF VANDALIA, OHIO,

Respondents.

OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION RESTATED

Whether the respondent police officers are entitled to qualified immunity on the grounds that their conduct did not violate a clearly-established federal, constitutional, or statutory right of petitioner, and whether the petitioner's complaint failed to state a claim upon which relief could be granted against the respondent city where the complaint simply alleges that the city "permitted and encouraged its police officers to conduct themselves in a particular manner."

PARTIES INVOLVED

In addition to respondents Bruce Sucher, John Sands, Dee Hail, Gary Jackson, Ken Poff, Donald Evers, and the city of Vandalia, Ohio, the Imperial Casualty and Indemnity Company has a financial interest in the outcome of the case as insurers of all named respondents.

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OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR DENYING THE WRIT

This case is an action brought by petitioner, John M. Jay, for money damages against the city of Vandalia, Ohio, and certain of its individual police officers for alleged violations of constitutional rights pursuant to 42 U.S.C. § 1983 and § 1988. The suit generally concerns the actions of the respondents in executing a search warrant at petitioner's residence on or about January 17, 1988. As part of their answer in the trial court, respondents raised the defense of qualified immunity as set forth by the United States Supreme Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and *Anderson* v. *Creighton*, ___ U.S. ___, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

The facts before the trial court established that Vandalia police officer John Sands responded to a burglary complaint on the evening of January 16, 1988, to a residence at 803 Bright Avenue in the city of Vandalia, Ohio. Among the items reported stolen were a video cassette recorder (VCR) and a large jar of coins. During his investigation, Sands personally observed a trail of coins and VCR parts leading from the burglarized residence at 803 Bright Avenue to the rear of petitioner's residence at 823 Bright Avenue. Officer Sands also noted that entry into the burglarized residence had been achieved by use of a crowbar and, in addition to the trail of coins and VCR parts, he observed a crowbar lying on the ground near the back door of petitioner's residence. After a back-up crew had been summoned and arrived, Sands and officer Dee Hail knocked on the front door of petitioner's residence but detected no response nor sound from inside. Various officers then began continuous surveillance of petitioner's residence while officer Hail returned to police headquarters to prepare the necessary papers for obtaining a search warrant.

A search warrant was issued at 5:45 a.m. on January 17, 1988, by the Honorable Carl D. Kessler, Presiding Judge of the Montgomery County, Ohio, Common Pleas Court, upon the affidavit of officer Hail.

Upon Hail's return to the scene, at approximately 6:20 a.m., the officers knocked on petitioner's front door and announced their presence. Pursuant to a tape recording of the execution of the warrant, made by officer Gary Jackson, a delay of approximately ten seconds ensued between the knock and announcement and the forcing of the front door. Although petitioner contends that the time interval was five seconds, such calculation is based solely upon officer Ken Poff's report which states that the officers conducted a "five-second count" before forcing the door. However, it is clear from listening to the tape that the five-second count of the particular officer was followed by a radio communication

between the officers present which resulted in the additional time.

Respondents filed a motion for summary judgment and for limitation of further discovery with the trial court on June 1, 1988, which motions were decided in respondents' favor pursuant to Decision and Entry dated September 1, 1988. Notice of appeal was filed with the United States Court of Appeals for the Sixth Circuit on September 23, 1988. By unanimous decision, which was not recommended for full text publication, the Court of Appeals affirmed the decision of the trial court pursuant to Order dated May 31, 1989. Petitioner filed his petition for writ of certiorari with this Honorable Court on August 28, 1989. Said petition was returned for improper form and subsequently refiled and received by counsel for respondents on September 25, 1989.

The issue in the Courts below concerning the individual police officers was their entitlement to qualified immunity. The test for the application of qualified immunity was set forth by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The relevant question is whether a reasonable police officer or officers, in the position of these officers, knew or should have known that their conduct was violative of a federal statutory or constitutional right, assessed in light of the legal rules that were "clearly established" at the time the conduct was taken. *Harlow* v. *Fitzgerald*, *Id.*, 457 U.S. at 818-819.

A complaint against a police officer for allegedly conducting an unreasonable search and seizure states a valid cause of action under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). However, this Court has said that the right the police officer is alleged to have violated must have been "clearly established" in a more particularized sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson* v. *Creighton*, *supra*, 97 L. Ed. 2d at 531.

Thus, it is not sufficient for petitioner to merely say that the actions of these police officers amounted to an unreasonable search and seizure and were, therefore, violative of his Fourth Amendment rights. Rather, the "clearly established" test must focus upon the particularized question of whether it was firmly established at the time of the execution of this specific warrant that a forcible entry by police into a suspect's residence when executing a warrant must be preceded by a specific period of time.

The trial court correctly reviewed and analyzed the status of the law in this area as it existed at the time of the subject search. As the court in *U.S.* v. *Ruminer*, 786 F.2d 381 (10th Cir. 1986) stated:

> Courts have upheld the validity of searches where the delay was one minute, thirty seconds, fifteen to twenty seconds, ten seconds, and forcible entry immediately after announcement has been upheld where there was likelihood of an attempt to escape, to resist, or to destroy evidence. A perusal of the cases shows the futility of fixing a hard and fast rule. The rule is not an inflexible one.

U.S. v. *Ruminer*, 786 F.2d at 384.

The question, then, is not whether ten seconds, or even five seconds, is a sufficient amount of time for the police to wait before making a forcible entry into a residence while executing a search warrant but, rather, the relevant question is whether the law in this area was so "clearly established" that, on an objective basis, these police officers or other police officers similarly situated should have reasonably known that their actions were unconstitutional. *See also*, *Hudson* v. *Edmondson*, 848 F.2d 682 (6th Cir. 1988). Given the status of the law in the area, it cannot be said that the contours of the alleged constitutional right were sufficiently clear so that a reasonable police officer would understand that by forcing the door after a ten-second delay he was violating a constitutional right of petitioner.

As the trial court pointed out, Ohio's "knock and announce" statute, which permits police officers to break down an outer door to a residence when executing a warrant, clearly demands the prerequisite of a knock and an announcement. What remains unclear is the interval of time that is permitted between the announcement and the forced entry. The burden is upon a plaintiff to come forward with such facts or allegations that show not only violations of his constitutional rights, but, also, that these rights were so clearly established when the acts were committed that any officer in a defendant police officer's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct. *Dominque* v. *Telb*, 831 F.2d 673 (6th Cir. 1987).

To this end, all that petitioner has presented to the courts below and now to this Court is a lower Ohio appellate court's interpretation of that state's knock and announce statute, which case construes such statute to permit police officers to infer that their admittance is refused under certain circumstances. *State* v. *DeFiore*, 64 Ohio App. 2d 115, 411 N.E.2d 837 (1979). The action of the present respondents in forcing the door was such that a reasonable officer could have believed it to be lawful in that, up to that point, there was no indication that anyone was at home, inasmuch as the police had knocked on the door one and one-half hours before the forced entry and elicited no response. This action was followed by continuous surveillance of the residence with no further indication of occupancy. *State* v. *Wilson*, 41 Ohio App. 2d 240, 325 N.E.2d 249 (1974).

Yet, regardless of the state court's interpretation of its own statute, petitioner's burden remains to show that respondents violated a "clearly established" *Federal* constitutional right. Although a state statute may govern the procedure to be used in the execution of a search warrant, the final determination of whether a particular search is constitutional must be made on the basis of Federal constitutional guarantees. To maintain his action under 42 U.S.C. § 1983, petitioner must allege

facts showing that these police officers acted to deprive him of rights, privileges, and immunities secured by the constitution and laws of the United States. He must allege more than the mere failure of state officials to follow state law, instead, he must show that these police officers acted in violation of a "clearly established" Federally-protected or constitutionally-guaranteed right. *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *Moore* v. *Kusper*, 465 F.2d 256 (7th Cir. 1972). Although respondents maintain that their conduct was in full compliance with Ohio's knock and announce statute, petitioner's claims nevertheless fail to set forth "clearly established" *Federal* constitutional guarantees which respondents should have been aware of at the time of their alleged misconduct.

It should be further noted that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Thus, the *Harlow* standard gives ample room for mistaken judgments. *Malley* v. *Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Because federal law did not clearly proscribe the actions of respondents, they are entitled to the immunity correctly granted to them by the courts below.

The sole allegation made against the respondent city was that the city permitted and encouraged the individual police officers to conduct themselves in the manner in which they acted. While petitioner need not state a particular statute or ordinance to evidence the policy or custom described in *Monell* v. *Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the liability of a municipality will only be for the injury inflicted by the execution of a government's policy or custom. In short, municipal liability is limited to actions for which the municipality is actually responsible. *Pembaur* v. *Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1985). The action of the municipality must be the kind that implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Under or-

dinary circumstances, a single incident of illegality will not infer an official policy unless it evidences deliberate indifference or gross negligence on the part of the municipal officials or their indifference to a pattern of misconduct. *Red Cross* v. *County of Rensselear*, 511 F. Supp. 364 (D.C.N.D.N.Y. 1981).

Petitioner has not pled, alleged, nor identified the existence of any such practice, policy, or decision to adopt a particular course of action. Neither has he identified the individuals responsible for implementing the same, or an official decision or tacit authorization approving harassment of petitioner. He has also failed to plead or allege a pattern of misconduct on the part of the individual police officers which would evidence a deliberate indifference by the city to ongoing police misconduct. Instead, the complaint alleges but a single incident for which the city should not be held liable on a respondeat superior basis. *Monell, supra*, 436 U.S. at 691. By simply alleging that the city has "permitted and encouraged its police officers to conduct themselves in a particular manner," petitioner has failed to meet the *Monell* standard.

Because federal law was not clearly established at the time of the actions of the respondent police officers, they are entitled to the qualified immunity granted to them by the trial court. Because petitioner has failed to plead or allege a particular policy or custom of the respondent city, or the execution thereof, petitioner's amended complaint against the city should be dismissed for failure to state a claim upon which relief can be granted.

Accordingly, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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